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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 578.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Respondent.

PETITIONERS' REPLY

To Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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To Brief of Respondent in Opposition to Petition for Writ of Certiorari.

REPLY TO RESPONDENT'S STATEMENT OF CASE.

Petitioners' statement of the case was sufficient, in our opinion, to support the three questions presented. Two of those questions go to the jurisdiction of the federal courts; and the other goes to the merits of the case—to the interpretation of the governing item of the division sheet supplement which was in effect during the period in which the traffic moved. The Court of Appeals is divided in its interpretation of the item—the crux of this case in so far as the merits are concerned—and, because

of its importance a question based thereon should not be waived by petitioners through failure to present, but should be saved for review and consideration by this court in the event the writ is granted.

Respondent's statement of the case is not as complete as it should be for brief purposes, and leaves some erroneous impressions.

The extensive hearings before the Interstate Commerce Commission and the reports and order issued by it as referred to on page 2 of Respondent's Brief have nothing whatsoever to do with this case. Petitioner, Missouri-Illinois, was not even a party to that case, and the points on its line were not within the scope of the order issued by the Commission in the case referred to. Approximately thirteen years after the division sheet (SWLs' D/S 100) was published following the decision by the Commission referred to, the Missouri-Illinois was invited by the parties to that division sheet, including the Missouri Pacific and Frisco, to become a party thereto (R. 84, 142, 143). In accepting that invitation and voluntarily becoming a party to the division sheet several supplements thereto were issued giving effect to Missouri-Illinois participation therein. Those supplements are 46, 47, 48. By those supplements, Flinton and Kellogg, Illinois, were added as division gateways and agreed division percentages to and from Kellogg were made applicable to and from Flinton (Item 66) (R. 143-147). It is the meaning of the written agreement—the division sheet—which governs and controls. (See Respondent's Brief p. 16).

The traffic in question moved from Greig, Oklahoma, a point in the Southwest, to Selmaville, Illinois, a point on the Missouri-Illinois. The traffic moved as routed over the Frisco, Missouri Pacific and Missouri-Illinois, and moved through two divisional gateways, namely, St. Louis, Mo.-East St. Louis, Illinois, and Flinton, Illinois, and at both of which gateways the traffic was interchanged be-

tween the carriers. It was interchanged by the Frisco with the Missouri Pacific at the St. Louis, Mo.-East St. Louis, Illinois, gateway, and by the Missouri Pacific with the Missouri-Illinois at the Flinton, Illinois, gateway (R. 71, 72, 76, 121).

The Frisco (Respondent) says (page 3 of its Brief) that the Missouri-Illinois in dividing the joint revenue over the Flinton, Illinois, gateway disregarded the divisional factors to and from St. Louis-East St. Louis notwithstanding the fact that all the shipments moved through that gateway, were interchanged thereat, and there passed from Southwestern Territory into Illinois Freight Association Territory.

The truth of the matter is that the Missouri-Illinois did not disregard any of those facts. Those facts might have been controlling if the parties had not agreed to something different on traffic moving between the Southwest and points on the Missouri-Illinois in Illinois. That agreement is embodied in Item 66 of Supplement 46 to SWLs' Division Sheet 100 (Pl's. Ex. 4, R. 31, 33, 34) and the reissue of that item in subsequent supplements, namely, Supplements 48, 52, 53 (Pl.'s Ex. 6, R. 47, 49; Ex. 8, R. 61, 63; Ex. 9, R. 65-69, respectively) and (R. 125-129). Furthermore, there is not one word in the Interstate Commerce Commission reports referred to by Respondent on page 2 of its Brief, and on which Respondent places so much reliance for the establishment of the so-called "Docket 15234 principle" referred to on pages 4 and 5, controlling the determination of the primary breakpoint on traffic interchanged at two of the gateways. The Missouri-Illinois, however, in voluntarily becoming a party to the division sheet protected itself against that very situation by having added as gateways the only two Mississippi River gateways served by it, and by making the same percentage factors applicable by each gateway (R. 76).

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT.

REPLY TO REASON I.

Petitioners are not aware of a single case where the federal courts, in the absence of diversity, have taken jurisdiction of a case involving a dispute between common carriers by railroad over the division of the joint revenue on interstate traffic. The Respondent has cited none. The courts below referred to none.

Division of joint revenue on interstate traffic is either by voluntary agreement of the participating carriers, or by the Interstate Commerce Commission upon complaint made to it by one or more of the carriers asking it to prescribe the divisions. In the instant case the divisions were voluntarily agreed upon by the participating carriers. The petitioners, the Missouri Pacific and Missouri-Illinois, contend that the joint revenue collected on the traffic in question was distributed by the Missouri-Illinois to the participating carriers in accord with the provisions of said voluntary agreement and that their duty under Section 1 (4) of the Interstate Commerce Act [49 U. S. C. A., Section 1 (4)] to establish just, reasonable and equitable divisions of joint rates, fares and charges has been fully complied with.

The Respondent contends that the Missouri-Illinois violated that agreement by breaking the divisions on the Flinton, Illinois gateway, instead of on the St. Louis, Mo.-East St. Louis, Ill., gateway, and therefore violated their duty under Section 1 (4) of the Interstate Commerce Act to maintain said agreed divisions.

Petitioners have never before heard it contended, as Respondent here contends, that the duty to establish divisions embraces the duty to maintain divisions. Petitioners submit that was a forced contention in an effort to

stay within the provisions of Section 1337 of the Judicial Code and the jurisdiction of the federal courts. Respondent contends (pp. 7-9) as alleged (R. 17) that its cause of action arose under the Interstate Commerce Act, 49 U. S. C. A., Section 1 et seq., and jurisdiction is conferred by that Act. If Respondent had any complaint with respect to the reasonableness of divisions it should have complained to the Interstate Commerce Commission. The prescription of divisions is a legislative and not a judicial function. **Baltimore & O. R. Co. v. United States** (1936), 298 U. S. 349, 356; **Terminal R. R. Ass'n. v. United States** (1924), 266 U. S. 17, 30, 31; **Thompson v. Baltimore & O. R. Co.** (C. A. 8, 1946), 155 F. 2d 767, 771. If a divisional agreement has been violated, the complaining party can sue at law to enforce that agreement as was so forcefully stated by this court in **Alton R. Co. v. United States** (1932), 287 U. S. 229, 236, but the court didn't say whether the state or federal courts would have jurisdiction. It is not without significance, however, that in each of the federal cases cited (pp. 10, 11, Respondent's Brief) as supporting its declaration, there was diversity of citizenship.

Cases to no end can be cited where the federal courts have jurisdiction in cases involving undercharges and overcharges on interstate shipments; suits to enforce reparation awards by the Interstate Commerce Commission; a suit to enforce an order by the Interstate Commerce Commission **prescribing** divisions; a suit complaining of the refusal of carriers to receive and transport freight tendered for shipment, or of the refusal of carriers to furnish cars for loading, but there is no single case we are aware of where the federal courts, in the absence of diversity of citizenship, and there is no diversity here (R. 1-2), had jurisdiction of a dispute between common carriers by railroad over the division of joint revenue on interstate traffic.

Petitioners submit that a division sheet is a contract, the interpretation of which does not present a federal question, and in the absence of diversity the federal courts do not have jurisdiction.

REPLY TO REASON II.

Respondent contends that its cause of action arose under the Interstate Commerce Act (49 U. S. C. A., Section 1 et seq.) (R. 17), and jurisdiction is conferred by that Act, but the limitation provisions of Section 16 (3) (a) and (e) do not apply. This contention is made notwithstanding the fact that this court in **Midstate Horticultural Co. v. Pennsylvania R. Co.** (1943), 320 U. S. 356, 361, held that Section 16 is an integral part of the Interstate Commerce Act and the comprehensive scheme of regulation it imposes. It also held in that case (l. c. 357-360) that the expiration of the time limit fixed by Section 16 (3) (a) of the Act for the bringing of actions by carriers for the recovery of their charges **does not merely bar the remedy but extinguishes the right.** The limitation goes to the Commission's and Courts' jurisdiction, so that they have no power to act when the time has expired. **Phillips v. Grand Trunk Ry.** (1915), 236 U. S. 662, 667; **Kansas City Southern Ry. Co. v. Wolf** (1923), 261 U. S. 133, 139; **Midstate Horticultural Co. v. Pennsylvania R. Co.** (1943), 320 U. S. 356, 364.

Respondent cites no cases to support its contention, but it does go into some detail in an effort to avoid the application of the **Midstate Horticultural Co.** principle by arguing that divisions are not charges. Respondent even goes so far as to say that Circuit Judge Johnsen, who expressed disagreement with the majority in their construction of 49 U. S. C. A., Section 16 (3) (a), but who, for the sake of unanimity, went along with the majority, overlooked "the facts that the transportation was completed and the charges therefor paid by the shipper before this dispute arose, and that no party to the dispute performed any com-

mon carrier service for any other party to this action" (p. 13, Respondent's Brief). Again, on page 12, Respondent says:

> "The amount of money sought by Frisco in this suit is not due it by reason of any service performed by it for the Missouri-Illinois, **but is a portion of the sum collected from the shipper**" (Emphasis supplied.)

Apparently Circuit Judge Johnsen did not overlook a thing. He says (p. 14, C. of App. decision):

> "I can see no reason on the statute to believe that, when Congress deemed it advisable, in the interest of uniformity and certainty, to impose a limitation on 'All actions at law by carriers . . . for recovery of their charges, or any part thereof,' it was in any way concerned about or intending to have regard for any theories, forms, technicalities and distinctions in common law actions or recoveries. I think it was fixing a time, as a general transportation-code policy, within which a carrier had to act to recover its transportation charges or revenues against anyone who owed it the duty of making payment thereof as such. And certainly what is here being recovered is in fact transportation charges or revenues."

To the same effect is the decision in **Mobile & O. R. Co. v. Washington & C. Ry. Co.** (D. C., S. D. Ala., 1917), 242 Fed. 531, 535, wherein it is stated:

> "The language is broad, and does not limit the receipt for carriage of the freight to the receipt from the shipper. The language embraces all payments of freight by any person, and includes in its terms, it seems to me, the various carriers over whose lines a shipment may pass, as well as the shipper and the carrier to whom payment is made by such shipper. I can see no reason to limit this language to transactions between the shipper and the carrier, when

the language has not been so limited by the act. Certainly the language is broad enough to embrace payment by one carrier to another over whose lines the freight moves. If the act is, by its terms, made a part of every contract of affreightment between the shipper and carrier, then it seems to me it is also made a part of every contract between the various carriers over whose lines the freight moves.

The act on its face shows all through it that its purpose was not merely to regulate the contracts between shipper and carrier, but, as its title imports, was to 'regulate commerce,' and it regulates this commerce as between all the parties to a shipment of freight over whose lines such shipment passes."

"A charge is the price fixed or demanded for services rendered." (p. 12, Respondent's Brief). The revenue divided by the Missouri-Illinois and the additional revenue demanded of it by the Frisco was the joint revenue collected for the performance of a joint service to the shipper. The Frisco contends that it has not yet received its full portion of the charge paid by the shipper. It has sued to collect that charge.

There seems to be no escape from the application of Section 16 (3) (a) whether emphasis is placed upon **"All** actions at law" or, as contended by Respondent, upon the controlling word "charges" (p. 15, Respondent's Brief).

Petitioners thereof submit that if Respondent's cause of action arises under the Interstate Commerce Act (49 U. S. C. A., Section 1, et seq.), Section 16 (3) (a), which is an integral part thereof, applies, and Respondent's right is extinguished.

The shipments moved during the period June 1, 1944 and October 31, 1945. Respondent filed suit on January 29, 1952 (R. 1, 2).

REPLY TO REASON III.

The Court of Appeals was divided in its opinion with respect to the merit of the case. Judge Sanborn wrote a dissenting opinion (C. A. Opinion, p. 15) in which he states:

> ". . . the record shows that the Missouri-Illinois Railroad Company became a party to the Division Sheet in suit upon the understanding, adequately expressed, that revenues derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways."

Petitioners' disagreement with the majority opinion of the Court of Appeals on the merits may not constitute adequate grounds in and of itself for a writ, but petitioners certainly do not wish to waive any right to a review on the merits if the court should grant the writ on the jurisdictional questions presented.

Finally, we call the court's attention to the Respondent's admission (p. 16) that:

> **"The Courts below were called upon to decide the meaning of a written agreement."**

CONCLUSION.

The questions presented are important for several reasons:

(1) Two of the questions presented are jurisdictional questions, which questions are always important;

(2) The jurisdictional questions presented have never been expressly decided by this court, and should be; and,

(3) Since the jurisdictional questions involved arise out of a dispute between common riers by railroad over the division of joint revenue on interstate traffic, the questions are of vital interest to the railroad industry as a whole because there are now pending before the Interstate Commerce Commission more division cases than were ever before that body at one time.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

Dated: March 2, 1955.